BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI.

(The Subject index will be found preceding the Petition for Certiorari.)

Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit in this case is not yet officially reported. It appears on pages 126-130 of the transcript of the record filed herewith. In the District Court no opinion was rendered. The findings and judgment are found at R. 114-115.

Jurisdiction of This Court.

The basis for the jurisdiction of this Court has been stated at page 9 of the preceding Petition for Certiorari.

Statement of Case.

The case is stated in the petition, page 2.

Statute Involved.

The statute involved in this proceeding is Section 75 of the Bankruptcy Act known as the farm-debtor law, particularly Section 75 (n), (o), (p), (q) and (s), 11 U. S. C. A., Section 203. The relevant parts of said subsections of said Section 203 are as follows:

> "(n) The filing of a petition or answer with the Clerk of the Court, or leaving it with the Conciliation Commissioner • • • shall immediately subject the farmer and all his property, wherever located, • • •

to the exclusive jurisdiction of the court, including * * * the right or the equity of redemption where the period of redemption has not or had not expired, * * * or where the sale has not been confirmed. * * * In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, * * * or where the sale has not or had not been confirmed, * * * the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section * * * In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asked to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of court.

"(o) *Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted,* or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court: * * *" (Italics ours.)

"(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land: * * *"

"(p) The prohibitions * * * shall apply to all

judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in (this section) section 75 of this Act."

"(q) A conciliation commissioner shall upon request assist any farmer in preparing and filing a petition under this section and in all matters subsequent thereto arising under this section and farmers shall not be required to be represented by an attorney in any proceeding under this section."

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, * * *"

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred in holding:

1. That an order permitting a foreclosure sale passing title to debtors' property and the State Court proceeding to quiet title in respondents by a Bankruptcy Court while debtors' proceeding was pending under subsections (a-r), Section 75 of the Bankruptcy Act, and before hearing and report of the Conciliation Commissioner was only a voidable order.

2. That the State Court judgment holding that the pendency of the Frazier-Lemke proceeding did not invalidate the State Court foreclosure rendered that question *res adjudicata* in the present action.

3. That the order of March, 1938, dismissing the debtors' proceeding though erroneous had become final (when not appealed from) and that the Bankruptcy Court had lost jurisdiction of the debtor and his property; and that the property, having thereafter been sold to O'Daniel and judgment entered in his favor in the State Court suit, it was now too late to attempt to reopen the debtors' proceeding.

4. That if it could agree with appellant (debtor) that the issues had been wrongfully decided in the State Court, it would nevertheless affirm the judgment.

5. That it agreed fully with the disposition made and the reasons given in the State Court opinion, *i. e.*, that the order of dismissal was merely erroneous and that the debtor was estopped from asserting the invalidity of said order by his inducing O'Daniel to purchase the land.

The Circuit Court of Appeals erred in not holding:

6. That the order permitting foreclosure was void and

all subsequent proceedings predicated on said order were void.

7. That a termination of a debtor proceeding "can be effected only pursuant to the precise procedure which Congress has provided" and that "petitioners were entitled to compliance with the procedure required by statute," i. e., no foreclosure proceedings except after hearing and report by the Conciliation Commissioner.

8. That upon the filing of the amended petition under subsection (s) the order permitting foreclosure passing title and permitting the State Court proceeding was superseded and rendered naught.

9. That an estate may be reopened by the Bankruptcy Court for cause shown at any time, and the court may modify or set aside any order, decree or judgment theretofore entered in the said estate.

10. That where a motion to reopen and reinstate a cause is filed and an answer is filed thereto and the court, having heard evidence both documentary and oral, examines the basis of its original order and makes findings of fact and conclusions of law, and enters a decree refusing to modify its original order, but giving affirmative relief to respondents, the court, in so doing, reopens the proceedings and that the time for review under 39, subsection (c), begins to run from the date of the last order refusing to modify the original. That the original order, even though not void, was erroneous and should be reversed in the absence of a finding that intervening rights could not be adequately protected.

11. That once a farm-debtor has instituted a proceeding under Section 75, his property is in *custia legis* and that the debtor is powerless to prejudice the estate in bankruptcy or to oust the exclusive jurisdiction of the Bankruptcy Court.

ARGUMENT.

I.

The order of December 4, 1937, of the District Court permitting foreclosure and a State Court proceeding to quiet title did not follow the mandatory provisions of Sections (n), (o) and (p) of Section 75 of the Bankruptcy Act, and the order is void.

The District Court by its order dated December 13, 1937, and filed December 14, 1937, permitted a mortgage-trustee sale to be held and State Court foreclosure proceeding to be maintained after the debtor had filed his petition under subsections (a) to (r) and before a hearing and report by the Conciliation Commissioner on the debtor's proposal in composition and extension with his creditors (R. Debtor's Exhibit No. 7, p. 61; Court's Finding of Fact No. (9), p. 38). The sale was held on January 4, 1938, and confirmed by the State Court (Cause No. 3231) on February 3, 1938 (R. Court's Finding of Fact No. (11), p. 40). Thereafter and on February 5, 1938, the Conciliation Commissioner made his report (R. Court's Finding of Fact No. (12), p. 40). The reason given by the District Court for permitting a foreclosure before the debtor had been afforded an opportunity of effecting a composition with his creditors in accordance with the provision of subsections (a) to (r), was "there is no equity in said land, nor any equitable and feasible method of liquidation or of financial rehabilitation for said (debtor), and no rights under the aforesaid bankruptcy proceeding" (R. p. 63; Court's Finding of Fact No. (9), p. 38). This order of December 14, 1937, purporting to vacate the stay of subsection (o), without following the mandatory requirements of that subsection, was void. The State Court

proceedings which respondent mortgage company thereafter conducted in reliance upon that void order were ineffective to destroy the debtor's rights or the rights of the creditors of debtor. As will hereafter be shown, the debtor is guilty of no conduct which forfeits his rights. The District Court in refusing to vacate this order which caused appellant to be ousted from his property makes no defense for that order (R. 43). It is indefensible. The debtor's petition to reopen his case should have challenged the court's conscience and power to correct the wrong which that order, admittedly erroneous, entails. Rather than using its equitable power and rectifying a wrong committed by it in the conduct of a proceeding in which its jurisdiction is paramount and exclusive, the District Court permitted that wrong to stand. The State Courts have followed its error and to complete the vicious circle, the courts below would follow the error of the State Courts.

The decision of the Court of Appeals holds, first, that the order "was not void, but merely erroneous." It acknowledged that its decision as to this point is in conflict with the decisions of three other Circuit Courts of Appeal, and with two decisions of this Court. The decision of the Court of Appeal in holding that the order was merely erroneous and not void is in conflict with all the other Circuit Courts of Appeal, being six in number, that have interpreted this remedial Act, as well as with numerous decisions of this Court.

In *Bastian* v. *Erickson,* 114 F. (2d) 338, l. c. 340 (10th C. C. A.), the court said:

> "The District Court has jurisdiction to grant permission to proceed against the debtor or his property in some other jurisdiction only after a hearing and report by the Conciliation Commissioner. *Union Joint Stock Land Bank of Detroit* v. *Byerly,* 301 U. S. 1,

60 S. Ct. 773, 84 L. Ed. 1041, decided by the Supreme Court April 22, 1940; *McFarland* v. *West Coast Life Ins. Co. et al.*, 9 Cir., 112 F. (2d) 567. *No hearing having been had before the Conciliation Commissioner, it follows that the District Court was without jurisdiction to grant appellee permission to proceed in any other court with relation to any property in which appellant had an interest.*" (Italics ours.)

Hoyd v. *Citizens Bank of Albany County*, 89 Fed. (2d) 106 (6 C. C. A.), was an appeal from an order of the District Court dissolving a restraining order issued in a proceeding filed under Section 75 (a) to (r) of the Bankruptcy Act. Appellant claims that the injunction was improperly dissolved because Section 75 (o), 11 U. S. C. A., Sec. 203 (o), provides for a stay of foreclosure proceedings and of sales under mortgage until after hearing had and report by the Commissioner. The court, after setting out the controlling Sections (n) and (o) of Section 75, held:

> "No hearing has been held before the Commissioner, and no report has been made by him to the court. Hence the prerequisites for securing leave of court to proceed with the sale are lacking. Subsection (o) *squarely applies, and is mandatory.* * * *" (Italics ours.)

In *Trego* v. *Wright*, 111 Fed. (2d) 990 (6 C. C. A.), the court held:

> "The provisions of Section 75, subsection (o) *were held mandatory* (italics ours) by this Court in *Hoyd* v. *Citizens Bank of Albany County*, 6 Cir., 89 Fed. (2d) 105, and in *Shadley* v. *Ludwig*, 6 Cir., 106 F. (2d) 745. All proceedings of the State Court during the pendency of the composition and extension proceedings which were carried out without compliance with the statute were void and of no effect. As held

by the Supreme Court in *Kalb* v. *Feuerstein*, 308 U. S. 433, 60 S. Ct. 343, 84 L. Ed. ....., under Section 75 of the Bankruptcy Act the State Court is deprived of the power and jurisdiction to continue and maintain the foreclosure proceedings in any manner except as provided by that section. *Cf. John Hancock Life Ins. Co.* v. *Bartels*, 308 U. S. 180, 60 S. Ct. 221, 84 L. Ed. ....."

In re Mahaffey, 129 F. (2d) 292 (2 C. C. A.), l. c. 294, the court held:

"By Section 75, subsection (o), 11 U. S. C. A., Sec. 1203, subsection (o), foreclosure proceedings may not be instituted or maintained at any time 'prior to the confirmation or other disposition of the composition or extension proposal,' except with the bankruptcy court's permission and following a hearing and report by the Conciliation Commissioner. * * *"

In *Collins* v. *Federal Land Bank*, 119 F. (2d) 228, l. c. 230, (8 C. C. A.), the court said:

"* * * 'Appellee does not contend that the bankruptcy court, where the bankrupt is in possession of property, does not have power, upon proper application and proof, to enjoin transfer of the property or maintain the *status quo* in regard to it, until its jurisdiction is determined. Nor does appellee contend that upon such proper application and proof of interest, the bankruptcy court did not have power to stay by injunction the expiration of the period for redemption in this case.' The obvious answer to this suggestion is that, *in providing for an automatic stay* (italics ours), Congress specifically eliminated the requirement which appellee here seeks to impose. The *status quo* is preserved by the language of the Act, and no judicial order is necessary."

In *Peterson* v. *John Hancock Mutual Life Ins. Co.*, 116 F. (2d) 148, (8 C. C. A.) the court said:

> "It is argued by counsel for appellee that the order overruling the motion for a rehearing entered on January 15, 1940, is not appealable because it is a discretionary order. In this view counsel are mistaken. The motion for rehearing called for judicial decision, not for judicial discretion. *Stetson* v. *Stindt*, 3 Cir., 279 F. 209, 212, 23 A. L. R. 302. Discretion, which must be a legal discretion, does not extend to a refusal to apply well-settled principles of law to a conceded or indisputable state of facts. *Winchester Repeating Arms Co.* v. *Olmstead*, 7 Cir., 203 F. 493, 494. In deciding the motion for a rehearing the District Court had jurisdiction to correct its previous orders. *The statute, as construed by the Supreme Court in the Bartels case, is explicit and mandatory, and the District Court had no discretion to act contrary to its terms.* (Italics ours.) *Carpenter* v. *Wabash Railway Co.*, 309 U. S. 23, 29, 60 S. Ct. 416, 84 L. Ed. 558. The orders entered prior to December 4, 1939, were consistent with the law as it had been announced at that time in the Cowherd and Bender cases, *supra*, but decisions are mere evidences of the law, not the law itself; and an overruling decision is not a change of law but a mere correction of an erroneous interpretation. *Legg's Estate* v. *Commissioner*, 4 Cir., 114 F. (2d) 760, 764. The change in interpretation brought about by the decision in the Bartels case is binding upon both the District Court and this court. The District Court having failed to recognize such change of interpretation, it is our duty on appeal in the administration of justice to reverse its erroneous orders."

In the case of *Naylor* v. *Cantley*, (8 Cir.) 96 Fed. (2d) 761, while proceedings were pending in the United States District Court for the foreclosure of a mortgage on

debtor's property on May 6, 1936, Naylor as a farm-debtor filed in the United States District Court a petition under Section 75 of the Bankruptcy Act, as amended August 28, 1935, the petition was approved by the court and referred to the Conciliation Commissioner. Notwithstanding the filing of the petition, the foreclosure procedure was continued. On August 7, 1936, the debtor filed a petition in the equity suit asking that the sale of the mortgaged lands be not confirmed and that the sale be vacated. On October 29, 1936, the United States District Court confirmed the order of sale and denied the debtor's petition to vacate. On April 20, 1937, some six months after the order of the United States District Court, debtor filed a petition in the bankruptcy proceedings, in which petition he asserted that all proceedings which had taken place in the foreclosure suit after filing his petition under Section 75 were *void* and prayed that said estate be administered by said Conciliation Commissioner and for all other proper relief. The appellants filed a response, asserting that the foreclosure sale having been confirmed, over the objection of the debtor, the entire matter was *res adjudicata*. On May 27, 1937, the court of bankruptcy denied the debtor's petition of April 20, 1937, and an appeal was taken.

The court held:

> "The single question presented is whether the United States District Court had jurisdiction to proceed in the foreclosure suit after the filing by the debtor of his petition under Section 75 of the Bankruptcy Act as amended.
>
> "Since, under the provisions of Section 75 of the Bankruptcy Act as amended, the court of bankruptcy was, upon the filing of the petition, vested with the sole and exclusive jurisdiction of the debtor and his property, and since *that court could not surrender its*

jurisdiction to any other court (italics ours), it was incumbent upon the court of bankruptcy to administer the estate of the farmer-debtor in accordance with Section 75 of the Bankruptcy Act. (Citing cases.)

"The order appealed from is reversed and the case is remanded to the court below with directions to procure, by appropriate orders, the vacation of all of the proceedings in the foreclosure suit subsequent to the filing of the debtor's petition. * * *"

In re Monjon, 113 Fed. (2d) 535, l. c. 538 (7 C. C. A.), the court said:

"* * * Upon the filing of her petition for relief under Section 75, the debtor was entitled to a stay of all other proceedings for a period sufficient to enable her to proceed thereunder. *Kalb* v. *Feuerstein,* 308 U. S. 433; *In re Price,* 7 Cir., 99 F. (2d) 691. This stay would operate to suspend the foreclosure decree and all provisions thereof, * * *"

In re Price, 99 Fed. (2d) 691, l. c. 693 (7 C. C. A.), the court said:

"The effect of subsection (n) conferring jurisdiction upon the bankruptcy court as to all property belonging to the farmer at the time of the filing of his petition for composition or extension, is to continue in operation all rights as they exist at the time of the filing of the petition, for an unfixed period sufficient to enable him to attempt to obtain a composition or extension of his debts in accordance with the provisions of the original Act. Then if such attempt fail, he may apply for adjudication in bankruptcy and the benefits of subsection (s). In the meantime, we understand that the stay which came into effect upon the filing of his original petition remains in effect so that the court has jurisdiction over the property which it may exercise to grant the stay provided by subsection (s)."

In *Corey* v. *Blake,* 136 Fed. (2d) 162 (9 C. C. A.), the court said:

> "Thus, instead of following the orderly procedure which the statute was designed to provide (*John Hancock Mutual Life Insurance Co.* v. *Bartels; Borchard* v. *California Bank*), the Commissioner followed a disorderly and unauthorized procedure. *Borchard* v. *California Bank.* In the course of, and as a part of that disorderly and unauthorized procedure, the Commissioner made his order of December 30, 1938, his order of January 4, 1939, and his order of April 18, 1942. The mortgagee (appellee) could have prosecuted the case before the Commissioner and could have required the Commissioner to proceed in accordance with the statute. Instead, he consented to the order of December 30, 1938, acquiesced in the order of January 4, 1939, and procured the order of April 18, 1942. He therefore cannot disclaim responsibility for the disorderly and unauthorized procedure followed by the Commissioner; nor can he maintain that procedure is the equivalent of that prescribed by the statute. (*Borchard* v. *California Bank, supra.*)"

In *Wilcons* v. *Penn. Mut. Life Ins. Co.,* 91 Fed. (2d) (10 C. C. A.), 417-419, the court held:

> "Whether appellees' names are in or out of the bankruptcy files and proceedings has no effect on the jurisdiction of the bankruptcy court conferred by subsection (n), which coupled with subsections (o) and (p), as amended, 11 U. S. C. A., Sec. 203 (n, o, p), *operate as an injunction against everyone* (italics ours) unless and until lifted in the way provided by subsection (o)."

In *Walker et al.* v. *Detwiler,* 110 Fed. (2d) (6 C. C. A.), 154-156, the court held:

> "The debtor having by his petition placed his property within the jurisdiction of the bankruptcy court under Section 75 of the Bankruptcy Act, all subsequent proceedings in the state court, including the writ by which he was dispossessed, are a nullity, and the order of the District Court directing appellants to vacate and restore possession of the property to the debtor is without error."

It is said in 5 Collier on Bankruptcy, 14th Ed., p. 190:

> "Subdivisions n, o and p operate to effect an automatic stay of the proceedings enumerated in the latter two provisions. This stay takes effect upon the filing of the petition under Section 75 (a) to (r) and needs no judicial order or decree to make it controlling. Any action taken in a nonbankruptcy court during the life of this stay within the prohibitory terms of subdivisions (o) and (p) and without the sanction of the bankruptcy judge as provided for in subdivision (o) *is utterly null and void* (italics ours), of no effect, and subject to collateral attack, even though no appeal is taken by the debtor.
>
> "Subsections (n), (o) and (p) are jurisdictional provisions (p. 180). * * * The one and only method by which the prohibited nonbankruptcy proceedings may be instituted or continued after the filing of the Section 75 petition is set forth in subdivision (o)." (p. 193.)

The decision of the Appellate Court is squarely in conflict with the many decisions of six of the other Circuit Courts of Appeal, which, as we have seen, hold that subsections (n), (o) and (p) of Section 75 are mandatory, and that "all proceedings * * * during the pending of the

composition and extension proceedings which were carried out without compliance with the statute, were *void* and of no effect." An intensive survey of the decisions of the Appellate Court does not reflect one decision since this Court's decision in *Kalb* v. *Feuerstein*, below, which sustains the Fifth Circuit Court of Appeals in their decision.

Further, the Court of Appeals recognizes and admits that its decision is in conflict with *Kalb* v. *Feuerstein*, 308 U. S. 433, and *Mangus* v. *Miller*, 317 U. S. 178 (R. 129). These decisions, as well as others of this Court hereinafter cited, hold that by the amendment to the Bankruptcy Act in 1935, Congress provided for an "automatic statutory ouster of jurisdiction of all (courts) except bankruptcy courts, over farm debtors and their property," which is to be administered "as provided in (this section) Section 75."

In *Kalb* v. *Feuerstein*, 308 U. S. 433, 60 S. Ct. 343, l. c. 348, the court said:

> "• • • The wisdom and desirability of an automatic statutory ouster of jurisdiction of all except bankruptcy courts over farm-debtors and their property were considerations for Congress alone. • • • It was the intention of Congress when it passed Section 75, that the farmer-debtor and all of his property should come under the jurisdiction of the court of bankruptcy and that the benefits of the Act should extend to the farmer, prior to confirmation of sale, during the period of redemption, and during a moratorium; and that no proceedings after the filing of the petition should be instituted, or if instituted prior to the filing of the petition, should not be maintained in any court or otherwise. • • • This was accomplished by granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts. • • •"

In *Adair* v. *Bank of America*, 58 S. Ct. 594, 303 U. S. 50, the court said:

> "Section 75 of the Bankruptcy Act provides opportunities for the rehabilitation of farms. It is sought to accomplish this rehabilitation through composition or extension of debts, subsection (e-l). On failure of composition and extension, further opportunity for rehabilitation is afforded the debtor through provisions enabling him to retain possession of his property, under conditions favorable to its ultimate redemption by him. These steps are carried out under judicial supervision, subsection (s). To accomplish its purpose, *Section 75 provides that the filing of the petition shall effect a stay.*" (Italics ours.)

In *Wright* v. *Union Central Life Insurance Co.*, 304 U. S. 502, 58 S. Ct. 1025, l. c. 1033, the court said:

> "Section 75 (n), 11 U. S. C. A. Section 203 (n), provides that 'the period of redemption shall be extended * * * for the period necessary for the purpose of carrying out the provisions of this section.' The stay may be approved for the period during which the debtor seeks to effect a composition and, as contemplated by Section 75 (s), for a moratorium not exceeding three years, * * *."

In *Wright* v. *Logan*, 315 U. S. 39, 62 S. Ct. 508, the court said:

> "* * * It is nevertheless appropriate to point out at this time that whatever right of redemption the petitioners had when they first applied for adjudication under 75 continued to be a part of their assets, subject to administration by the bankruptcy court. For 75, subsection (n), subjects all of the farmer debtor's assets, specificially including rights of redemption, to the jurisdiction of the bankruptcy court, and provides that 'the period of redemption shall be

extended * * * for the period necessary for the purpose of carrying out the provisions of this section'."

In *John Hancock Mutual Life Ins. Co.* v. *Bartels*, 308 U. S. 180, 60 S. Ct. 221, the court said:

"We hold that on his amended petition invoking subsection (s) Bartels was entitled to be adjudged a bankrupt and to have his proceeding for relief entertained and his property dealt with in accordance with that subsection."

In *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273, 61 S. Ct. 196, the court said:

"The granting of a request for public sale is mandatory. But so is the granting of a request for valuation at which the debtor may redeem * * * the Act must be liberally construed to give the debtor full measure of the relief afforded by Congress lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act * * * under our construction, however, the debtor will be given the benefit of an express mandate of the Act. * * * The power of the court to order the property sold or otherwise disposed of as provided for in this Act (title) cannot be taken to mean a discretionary power to terminate the proceedings through the exclusive device of a public sale. Congress has provided that certain contumacious conduct on the part of the debtor or his inability to refinance himself within three years may be an appropriate basis for a termination of the proceedings or for an acceleration thereof. We cannot infer, however, that Congress intended that such facts should have any further legal significance under the Act. To hold that they empowered the court to deprive the debtor of his express and fundamental statutory right to redeem at the reappraised value or

at the value fixed by the court would be to imply a power of forfeiture wholly incompatible with the broad design of the Act to aid and protect farmer-debtors who were victims of the general economic depression. *Wright* v. *Vinton Branch, supra,* 300 U. S., page 466, 57 S. Ct., page 563, 81 L. Ed. 736, 112 A. L. R. 1455. Such an important remedial right cannot be lost by mere implication. And to hold that the court has the discretion to deny or to grant the debtor's right to redeem at the reappraised value or at the value fixed by the court, dependent on general equitable considerations, would be to rewrite the Act, so as to vest in the court a power which Congress did not plainly delegate. This discretionary power of the court is exhausted when the court terminates the procedings or accelerates their termination. *Such termination can be effected only pursuant to the precise procedure which Congress has provided.*" (Italics ours.)

In *Borchard* v. *California Bank,* 60 S. Ct. 957, 310 U. S. 311, the court said:

"The precise matter in controversy is whether the bankruptcy court may permit foreclosure of mortgage liens where the procedure prescribed by Section 75, subsection (s), has not been followed."

The court, in holding the negative, held:

"The petitioners were entitled to compliance with the procedure required by the statute. The bank, at any time, could have obtained action by the Conciliation Commissioner and the court, in accordance with the statute. It can not now maintain that the disorderly and unauthorized procedure followed by the parties is the equivalent of that prescribed by the statute and that, as the petitioners have not been able to rehabilitate themselves, it is entitled to enforce its liens."

In *Mangus* v. *Miller*, 317 U. S. 178, 63 S. Ct. 182, 185, the court held:

> "Section 75, subsection (e) provides that 'after the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interest of the farmer and his creditors.' During such control the court is free to permit and to facilitate proceedings in the state courts which would adjudicate the interest of the parties in the contract, *subject to the stay directed by Section 75, subsection (o), of any cancellation of the contract or foreclosure of petitioner's interest in it.*" (Italics ours.)

This debtor was arbitrarily denied the privilege of the "automatic statutory stay" which Congress provided for distressed farmers. He was denied his day in court. He applied to the Bankruptcy Court for an injunction (R. 38) against the State Court proceeding and the District Court determined "that there is no equity in said land or any equitable and feasible method of liquidation or of financial rehabilitation for said (debtor) and no rights under the aforesaid bankruptcy proceedings" (R. 63). Subsections (a-r) of the Act do not provide for an appraisal of debtor's property.

In *John Hancock Mutual Life Ins. Co.* v. *Bartels*, (*Supra*), the court said:

> "The subsections of Section 75 which regulate the procedure in relation to the effect of a farmer-debtor to obtain a composition or extension contain no provision for a dismissal because of the absence of a reasonable probability of the financial rehabilitation of the debtor."

There is no basis for such order in the Act. The court did not have jurisdiction to enter such an order and the order is void.

In *Vallely* v. *Northern Fire Ins. Co.*, 254 U. S. 348, 41 S. Ct., 117, an insurance company upon its default was adjudged an involuntary bankrupt and no appeal was taken. Administration proceeded as usual with the bankrupt's consent. Later the bankrupt filed a motion to vacate the adjudiction and to dismiss the proceeding. The motion was sustained upon authority of Section 4 (b). On certification of the question of whether the order of adjudication was void or simply voidable, the court said (245 U. S., l. c. 353, 355, 356):

> "The courts are constituted by authority and they can not go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable but simply void and this even prior to reversal * * * The Act of June 25, 1910, which covers the present proceeding, is peremptory in its prohibition. It excludes, by Section 4 (a), insurance companies from the benefits of voluntary bankruptcies, and by Subdivision (b) prohibits them from being adjudged involuntary bankrupts. The effect of these provisions is that there is no statute of bankruptcy as to the excepted corporations and necessarily there is no power in the District Court to include them * * * For a court to extend the Act to corporations of either kind is to enact a law, not to execute one. * * *"

In *Windsor* v. *McVey*, 93 U. S. 274, the court said (l. c. 282):

> "All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of actions * * *; or to particular modes

> of administrating relief, * * *; though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by law. If, for instance, the action be upon a given demand, the court, notwithstanding its complete jurisdiction over the subject and the parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant * * * The judgments mentioned, given in the cases supposed, would not be merely eronneous, they would be absolutely void; because the court in rendering them would transcend the limitations of its authority in those cases * * * So a departure from the established modes of procedure will render the judgment void. The doctrine stated by counsel (*i. e.*, that the judgment is voidable, not void), is only correct when the court proceeds, after acquiring jurisdiction of the cause according to the established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment, the law which is applicable to it."

Ex Parte Lange, 18 Wall. 163, l. c. 177, the Supreme Court held:

> "When the requisitions prescribed are intended for the protection of the citizens, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer under such cases is limited by the manner and conditions prescribed for its exercise."

In the case of *United States F. & G. Co.* v. *Bray,* 225 U. S. 205, 32 S. Ct. 620, the court said:

> "Of the fact that the suit was begun in the Circuit Court with the express leave of the court of bankruptcy it suffices to say that the latter was not at liberty to surrender its exclusive control over matters of administration, or to confide them to another tribunal."

See also—

Gross et al. v. *Irving Trust Co.,* 53 S. Ct. 605, l. c. 606;
Isaacs v. *Hobbs Tie & T. Co.,* 282 U. S. 734, 737, 51 S. Ct. 270, 75 L. Ed. 645, and cases cited.

In *Ventress* v. *Smith,* 10 Peters 176, the Supreme Court held:

> "* * * And although defendant's testator was a bona fide purchaser, for a valuable consideration and without notice, the sale being without authority and against law, he acquired no title that will bind the property against the party who has right."

In conclusion on this point we submit that because the original order in this case was void, the suit in which it was mistakenly entered is still pending.

In *United States* v. *Turner,* 47 Fed. (2d) 86, l. c. 88, the court said:

> "*Because the original decree in this case was void, the suit in which it was mistakenly entered was still pending* (italics ours), and the appellant had the right to ask that the entry of such a decree as had been rendered should be stricken from the records of the court as an impediment to a proper disposition of the suit."

Furthermore, the case of *Union Joint Stock Land Bank* v. *Byerly,* 310 U. S. 1, and *Bernards* v. *Johnson,* 314 U. S. 19, cited in the court's decision as supporting respondents' contention that the order of December 14, 1937, is "merely erroneous," are not controlling or decisive of the question of the voidability of the order, because those decisions were based on different factual grounds than herein involved and were an interpretation of Section 75 before it was amended in 1935.

The Supreme Court in *Union Joint Stock Land Bank* v. *Byerly,* 310 U. S. 1, 60 S. Ct. 773, held that a similar order made by the Bankruptcy Court before the amendment to Section (n) was not void but only voidable. In that case the order had been made on November 23, 1934, and the court expressly pointed out that subsection (p) was not applicable to that case. The court said:

> "The provisions of subsection (p) as it was when the petition was filed, have no application. That subsection was amended by the Act of August 28, 1935, *supra,* to provide 'the prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official * * *' This amendment was made after the dismissal of the bankruptcy case."

That fact distinguishes the Byerly case from the Kalb case.

The order now under consideration was made December 14, 1937, when subsection (p), *supra,* as amended, was in effect and the Byerly case is not in point.

Furthermore, in the Byerly case no foreclosure sale was completed while the bankruptcy proceedings was pending, nor did the sale change the status of the debtor's right of redemption. (60 S. Ct. 773, l. c. 776.) In the case at bar, the foreclosure sale was held while the farmer-

debtor proceeding was pending and the sale under the Texas law passed absolute title. *Wisong* v. *Van Auken,* (Civ. App.) 29 S. W. (2d) 930.

In the Bylerly case the court said:

> "The case is analogous to one wherein a State Court foreclosure proceeding has been completed and deed delivered to the sheriff's vendee prior to the filing of the petition under Section 75." (60 S. Ct., l. c. 777.)

In the case at bar the proceeding in bankruptcy was pending at the time of the foreclosure sale and the court's judgment and conveyance of title to E. T. O'Daniel. Consequently, the Byerly case is not controlling here. The inference in that case is clear, however, that if the order had been made after the amendment of Section (p) it would have been void. To have held otherwise would have caused the decision to be in conflict with the Kalb case.

The Appellate Courts, in cases involving the effect of an order made contrary to the procedure prescribed in Section 75, as amended, have had occasion to construe the Byerly case and have determined that it was not decisive where the order was made while the proceedings were pending.

In *Trego* v. *Wright, supra,* the court held:

> "The instant case is distinguished from *Union Joint Stock Land Bank of Detroit* v. *Byerly,* 60 S. Ct. 773, 84 L. Ed. ....., decided by the Supreme Court on April 22, 1940, by the fact that in that case the sheriff's sale was confirmed and the sheriff's deed was delivered and recorded after the petition of the farmer-debtor's motion had been dismissed, and prior to the farmer-debtor's motion for reinstatement under the newly re-enacted subsection (s). The bankruptcy court in that case, therefore, did not have jurisdiction

of the proceedings at the time of the State Court's confirmation of sale and delivery of deed. Here the appellant's petition, subsequent to the filing on January 26, 1935, was pending in the bankruptcy court at all times prior to the confirmation of sale on February 11, 1935, in its State Court."

The *Byerly* case, for the same factual difference as exists in the case at bar, was distinguished in *In Re Monjon,* 113 Fed. (2d) (7 C. C. A.) 535, 537:

"Appellee also contends that a recent ruling of the Supreme Court in *Union Joint Stock Bank* v. *Byerly,* 310 U. S. 1, 60 S. Ct. 773, 84 L. Ed. 1041, announced April 22, 1940, upholds its contention that where leave was granted by the bankruptcy court for a secured creditor to continue prosecution of a foreclosure proceeding, such procedure was voidable rather than void, and further proceedings pursuant to such leave are subject only to direct review, and not to collateral attack. It argued from this that since there was no appeal from the order authorizing the foreclosure suit to proceed, nor from the decree of foreclosure and the approval of the sale thereunder, both became final and may not be reviewed by the appeal now before us. Appellee loses sight of the very significant factual distinction between the situation here presented and that before the Supreme Court, namely, that here the period of redemption had not expired when the petition for relief under Section 75 was filed, whereas in the Byerly case, there was no bankruptcy proceeding pending when the sale became final by issuance of the sheriff's deed to the foreclosed property, and a petition for reinstatement of the proceeding for relief under Section 75 was not filed until thirteen days thereafter. Hence, we are of the opinion that the Byerly case is not authority for the dismissal of the debtor's petition in the case at bar."

In *Bernard's et al.* v. *Johnson et al.*, 314 U. S. 19; 62 S. Ct. 30, the foreclosure sales were made on June 29, 1934, and on August 26, 1935 (314 U. S., l. c. 22; 62 S. Ct., l. c. 32), (1) after the (a) to (r) proceeding had been concluded, and (2) in the interim between the end of old subsection (s) (May 27, 1935), and the advent of a new subsection (s) (August 28, 1935), and (3) before the amendment of subsection (p) (August 28, 1935).

The validity of an order made by the District Court purporting to permit foreclosure during the pendency of an (a) to (r) proceeding and directly contrary to the absolute prohibition contained in subsections (o) and (p) as amended, was not involved in Bernard's case. In fact, no proceeding under Section 75 was pending when the sales were made in that case, and no orders entered while the proceeding was pending under (a) to (r) were complained of in that case.

The Court of Appeals, in its decision (R. 129), also states that it agrees with the appellees that the order of dismissal was erroneous and that after it became final "the Bankruptcy Court lost its jurisdiction of the debtor and his property, and that the property, *having thereafter been sold to O'Daniel* and judgment entered in his favor * * * it is too late now to attempt to reopen the proceeding." The determination of the court is not supported by the record. After the mortgagee recovered judgment in the State Court on February 5, 1938, it conveyed the property to O'Daniel under date of February 11, 1938 (R. 8 (12) 17 (13)). The Record also shows that the amended petition under (s) was filed in December, 1937, thereby continuing the court's jurisdiction (R. 69, 70, 75, 89-91, 120). Assuming *arguendo* that the debtor did not file the amended petition, nevertheless the dismissal of the (a-r) proceeding would not terminate the

court's jurisdiction "for 75, subsection (n), subjects all of the farmer-debtor's assets, specifically including rights of redemption, to the jurisdiction of the Bankruptcy Court, and provides that 'the period of redemption shall be extended *for the period necessary* (italics ours) for the purpose of carrying out the provision of this section.' * * * and petitioner's lack of diligence, if any, does not deprive him of the benefits of Section 75, subsection (s)." *Wright* v. *Logan, supra.* Further, Section 91 (e) of Tit. 11, U. S. C. A., provides that "whenever the affairs of the estate are ready to be closed, a final meeting of creditors *shall* be ordered." The record in this case does not disclose that this mandatory provision was met and as a result the estate has not been closed but "remains open for the exercise of all jurisdiction proper in the bankruptcy proceedings." *In Re Rubin's Department Store,* 75 Fed. (2d) 731.

By Section 2 (a) of the Bankruptcy Act (11 U. S. C. A., Sec. 11 (a)) the District Courts of the United States are vested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, and by clause 8 of Section 11, they are expressly given power "to reopen the estates for cause shown."

In *Williams* v. *Rice,* 30 Fed (2d) 814 (5 C. C. A.), the court said:

> "By Section 2 of the Bankruptcy Act (11 U. S. C. A., Sec. 11), the district courts of the United States are vested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, and by clause 8 of said Section 2, *they are expressly given power to reopen estates whenever it appears they were closed before being fully administered. There is no*

limitation to the time in which estates may be reopened. See *Pfister* v. *Northern Ill. Finance Co.*, 317 U. S. 144, 153, 63 S. Ct. 133, 139.

In conclusion, we submit that the order of December 14, 1937, permitting the foreclosure was void and the order of March 28, 1938, dismissing the proceeding was mistakenly entered and the cause was and is still pending. *U. S.* v. *Turner*, 47 Fed. (2d) 86, 89.

II.

A. The judgment of the State Court is not *res adjudicata* as to the issue of whether said amended petition superseded and rendered naught the said order made in the (a-r) proceeding permitting the foreclosure, or to any other question of law.

The judgment of the State Court predicated on a void order of the Bankruptcy Court is a nullity and has no force as *res adjudicata*. *Robertson* v. *Gordon*, 226 U. S. 311, 33 S. Ct. 105, 107; *Brown* v. *Fletcher*, 182 Fed. 963; *Parr* v. *U. S.*, 105 Fed. 462; *Dennison* v. *Payne*, 293 Fed. 333.

Affirmance of a void judgment in an Appellate Court adds nothing to its validity. *Pioneer Land Co.* v. *Maddox*, 42 P. 297; *Latimer* v. *Vanderslice*, 69 P. 1197, 1200; *Goodwin* v. *Buffalo*, 162 F. 187 (8 C. C. A.); *Harris* v. *Hardeman*, 14 How. 334.

The doctrine of *res adjudicata* does not apply to an "unmixed question of law" as here presented. Those questions are: First, was the order void? Second, was the order superseded and rendered naught by the filing of the amended (s) petition? Both are questions of law. This Court has held in *U. S.* v. *Mosher*, 266 U. S. 236, 45 S. Ct. 66, 67:

> "The contention of the government seems to be that the doctrine of *res adjudicata* does not apply to questions of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases • • •"

B. The order of the Bankruptcy Court entered during an (a) to (r) proceeding, purporting to authorize foreclosure, even though valid, was superseded and rendered ineffective by the filing of the farmer's amended petition under subsection (s).

The debtor testified positively that in December, 1937, he prepared and filed with the Conciliation Commissioner his amended petition under subsection (s) (R. 69, 70, 75). He produced an unsigned copy of this amended petition (R. Debtor's Exhibit No. 10, pp. 101-113). A disinterested witness (Garlington) testified (R. 89-91) that two years later this amended petition was in the office of the Conciliation Commissioner and he followed it as a form in his own case. The file copy of this original petition cannot be found. In his certificate (R. 124) the Clerk certifies that an unsigned, unfiled copy of this amended petition (Exhibit No. 10) "appears with the papers on file in this office." The debtor introduced the entire file in the proceedings in evidence (R. 68).

Because the original of this amended petition could not be found in the papers of this case at the time of the hearing below, the District Court ruled that it had not been filed nor delivered to the Conciliation Commissioner for filing (R. p. 38). The finding that the original document bearing a filing mark could not be found among the papers is supported by the evidence. In fact, the Clerk

testified that the Conciliation Commissioner did not "file those papers" and "his action is not filed in our office except as included in the final report" (R. 68). But the finding, that the amended petition had not been delivered to the Commissioner for filing, is an inference based solely upon the absence of the original document from the files. This inference vanishes in the face of the uncontroverted testimony of two witnesses that the document was delivered to the Commissioner.

> "The court is bound to give credence to uncontradicted testimony even from interested persons when it is substantiated as it was here and not inconsistent with well-known facts, experience and reason." *Epremiam* v. *Ward*, 169 Fed. 691; *In re Strauch*, 208 Fed. 842.
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> "• • • The court cannot arbitrarily reject the testimony of a witness whose testimony appears credible." *Ariasi* v. *Orient Ins. Co.*, 50 Fed. (2d) 548, 551.

The failure of the Commissioner to take any action on the amended petition was doubtless caused by the action of the District Court, here complained of, in permitting the property to be sold on January 7, 1938, and the sale to be confirmed on February 3, 1938. The debtor, he thought, was "wiped out."

The court's statement (R. p. 39) that before the present action the debtor had never claimed that the amended petition had been filed or delivered to the Conciliation Commissioner is contradicted by the record.

In said State Court, suit No. 3231, petitioner pled in bar and abatement the pendency of his petition under the Frazier-Lempke Act. *Wheat* v. *Texas Land & Mortgage Co.*, *supra*. In the allegation of respondents' answer to debtor's motion respondent pleads *in hac verba* its answer filed in the State Court Case No. 4076. That allega-

tion is (R. 18) "* * * even though the debtor filed petition * * * to be adjudicated a bankrupt under Section 75, subsection (s) of the * * * Act." In debtor's petition to the Supreme Court of Texas for writ of error, debtor said: "The determination of this case evolves solely around the consideration of the Frazier-Lempke Act, particularly under Section 75, subsection (s) of the Act." (S. Ct. Ex. 123.)

General Order No. 50, p. 11, provides: "The Conciliation Commissioner shall have all of the powers and duties of a referee in bankruptcy." Sec. 75 (s) (4) provides that the Conciliation Commissioner "shall continue to act and act as referee, when the farmer-debtor amends his petition or answer, asking to be adjudged a bankrupt under provisions of subsection (s) of Section 75 of this Act." Section 75 (n) provides that "in proceedings under this section * * * the jurisdiction and powers of the court (and the rights of all parties) shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition asking to be adjudged a bankrupt * * * was left with the Conciliation Commissioner for the purpose of forwarding same to the clerk of the court." Consequently, when the debtor delivered his amended petition asking to be adjudged a bankrupt to the Conciliation Commissioner he *ipso facto* became a bankrupt. The exclusive jurisdiction of the Bankruptcy Court at once attached. All of the rights accruing under Section (s) at once accrued to the bankrupt. The rights of creditors with respect to the property of the farmer at once accrued. The farmer cannot be penalized for the derelictions of the referee. This legislation requires the referee to protct the interests of the farmer.

As stated in *Chapman* v. *Federal Land Bank of Louisville*, 117 Fed. (2d) 321 (6 C. C. A.):

> "Section 75, subsections (a-r), and Section 75, subsection (s), are not in effect separate and distinct acts, but are warp and woof of the same piece of constructive relief legislation for the distressed farmer-debtor."

The automatic stay previously afforded under subsections (n) and (o) continues to operate until adjudication under 75 (s) is rendered. *In re Price*, 99 Fed. (2d) 691 (7 C. C. A.); *In re McCulloch*, 100 Fed. (2d) 937 (7 C. C. A); Collier on Bankruptcy, 14th Ed., Volume 5, pages 189-190.

The filing or leaving of the amended petition under (s) with the Conciliation Commissioner for filing met the requirements of the statute. (Subsections (n) (s).) After debtor filed his amended petition with the Conciliation Commissioner his status was that of an adjudicated bankrupt, *Price* v. *Louisiana R. R. Corp.*, 134 Fed. (2d) 548 (5 C. C. A.), and the statute does not require debtor to take any further action until the first hearing is called by the Conciliation Commissioner. (s)

The record shows that the (a) to (r) proceedings failed and the farmer filed his amended petition in December, 1937, asking to be adjudged a bankrupt under Subsection (s) and as of right he became entitled to the provisions of that subdivision. *John Hancock Mutual Life Ins. Co.* v. *Bartels, supra.*

The filing of such amended petition in order to be effective and to fulfill the intent and spirit of the Act must of necessity suspend and supersede any orders permitting a foreclosure under Sections (a) to (r), otherwise the rights of the farmer under Subsection (s) would be "greatly circumvented if not wholly obscured."

In *Brinton* v. *Federal Land Bank*, 129 F. (2d) 740, l. c. 744 (10 C. C. A.), Cert. Denied 317 U. S. 694, the court held:

> "The right to invoke the remedial provision under Section 75, subsection (s) is conditioned only on a failure or a grievance under Section 75, subsections (a) to (r), 'and a previous discharge of the debtor under any other section of this title shall not be grounds for denying him the benefits of this section.' Section 75, subsection (s) (5). See *Cohan* v. *Elder, supra.* If the finality of orders made by the court under subsections (a) to (r) shall be made to control the jurisdiction under subsection (s), the Congressional intent and purpose of Section 75, subsection (s) would be greatly circumvented, if not wholly obscured. * * *
>
> "In the light of the remedial and beneficent purposes of Section 75, subsection (s) *we do not think that an order by the court of bankruptcy authorized by subsection* (o) *discharging the bankrupt's property from its jurisdiction* (italics ours), operates as a bar to subsequent jurisdiction over the same property under subsection (s) upon an amended petition of the bankrupt if the debtor has a justifiable interest in the property at the time jurisdiction under subsection (s) is invoked."

Having been "adjudged a bankrupt" upon the filing of his amended petition and the petition not having been dismissed, we submit that the farmer is today "a bankrupt" and subject to the provisions of subsection (s). Substance should not be waived for the sake of form and "technical consideration (in the administration of the debtor's estate) will not prevent substantial justice from being done." *Pepper* v. *Litton*, 308 U. S. 295, 60 S. Ct. 238, 244. *And petitioner's lack of diligence, if any, does not deprive him of the benefits of Section 75, subsection*

(s). *Wright* v. *Logan, supra.* Further, we must consider that the respondent mortgagee, who was represented by counsel and had knowledge of the amended petition having been filed (R. 18), could have petitioned the Conciliation Commissioner for a first hearing if it had so desired and "it therefore can not disclaim responsibility for the disorderly and unauthorized procedure followed by the Commissioner." *Borchard* v. *Bank of California,* 310 U. S. 311, 60 S. Ct. 957, l. c. 960; *Corey* v. *Blake,* 136 Fed. (2d) 162 (9 C. C. A.).

We submit:

> "The Act must be liberally construed to give the debtor full measure of the relief afforded by Congress lest the benefits be frittered away by mere formalistic interpretations which disregard the spirit and the letter of the law." *Wright* v. *Union Central Life Ins. Co., supra,* and
>
> "* * * that whatever right of redemption the petitioner had when they first applied for adjudication under 75 continued to be a part of their assets, subject to administration by the bankruptcy court. For Section 75, subsection (n), subjects all of the farmer debtor's assets, specifically including rights of redemption, to the jurisdiction of the bankruptcy court, and provides that 'the period of redemption shall be extended * * * for the period necessary for the purpose of carrying out the provisions of this section.' * * *." *Wright* v. *Logan, supra.*

This debtor is entitled both by the letter and spirit of the Act to have his petition under (s) acted upon as in said section provided. *Mangus* v. *Miller,* 317 U. S. 178, 63 S. Ct. 182; *Wragg* v. *Fed. Land Bank,* 317 U. S. 325, 63 S. Ct. 273.

III.

Courts of bankruptcy are essentially courts of equity and their proceedings are inherently proceedings in equity.

The Circuit Court of Appeals held (R. 130) that if the issues had been decided wrongfully in the State Court, it would, nevertheless, affirm the judgment of the District Court in refusing to modify the original decree. It is difficult to comprehend a court of equity making such a statement. The court does not state that it has not the jurisdiction to correct such a wrong. But contrary to its own decision in *Seagraves* v. *Wallace,* 69 Fed. (2d) 163, "that justice is better than consistency," it now states that even though a wrong was committed it would "nevertheless affirm the judgment." The decision of the Appellate Court agrees with the respondents that the order was "erroneous." Consequently, this debtor has been deprived of benefits of the Act. The debtor has not had his day in court and he has been deprived of his property. The schedules of debtor (R. 13) showed the value of the property to be approximately $150,000.00 at the time of the foreclosure, and the mortgage indebtedness as approximately $37,500.00. The unimpeached testimony of a disinterested witness placed a value of approximately $25.00 an acre at the time of the foreclosure (R. 90). Thus there was a strong possibility of financial rehabilitation of the debtor, yet this court of equity says, even though the judgment is erroneous, it will not do anything about it. The statement reveals that the Appellate Court has misconstrued this remedial act and the intent and purpose of Congress in enacting it. It is contrary to every decision of this Court concerning this Act since the case of *Wright* v. *Union Central Life Ins. Co.,* 308 U. S. 502, 58 S. Ct. 1025, as well as to all principles of equity.

IV.

Any participation by the debtor in the mortgagee's sale of the property to respondent O'Daniel did not estop the debtor from claiming his rights under Section 75, or waive the exclusive jurisdiction of the court.

The Circuit Court of Appeals held that it agreed with the dispositions made and the reasons given in the State Court opinion (*Wheat* v. *Texas Land & Mortgage Co. supra*). As stated in Point IV of the Reasons for Granting the Petition, the State Court opinion held that the debtor was estopped from maintaining the invalidity of the said order as he had induced O'Daniel to purchase the land. Such a decision is contrary to the decisions of this Court and numerous decisions of the Appellate Court.

Upon the filing of the debtor's amended petition, the duties of the farmer and the rights and liabilities of all parties with respect to his property were the same as if an adjudication had been entered on a voluntary petition and the Bankruptcy Court's jurisdiction was exclusive (Section 75 (n)). Thereafter the farmer's status was that of a bankrupt and his custody of his property was that of a quasi trustee. In neither capacity could his acts affect the exclusive jurisdiction of the Bankruptcy Court or his rights under subsection (s).

In *Price* v. *Louisiana Rural Rehabilitation Corp.*, 134 Fed. (2d) 548, l. c. 549 (5 C. C. A.), Justice Holmes held:

> "Section 75, subsection (n), plainly subjects the property of the debtor to the exclusive jurisdiction of the bankruptcy court, and charges the court with the duty of administering that property so as to safeguard and effectuate the interests of both debtor and creditor. Moreover, the court's control over the debtor and his property is expressly made coextensive with that of the court in ordinary bankruptcy

proceedings. One who files a voluntary petition in bankruptcy, and is adjudicated a bankrupt, is wholly without power to alienate his property subsequent to the entry of the decree.

"The filing of the debtor's petition was a *caveat* and notice to all the world. Knowledge of appellant's incapacity to make a valid lease of the property was imputed to both parties, each being presumed to know the law, and acts done by either in reliance upon the validity of the contract cannot be said to result from the inducement of the other."

In the case of *Stanolind Oil & Gas Co.* v. *Logan,* 92 F. (2d) 28 (5 C. C. A.), the court held:

"Appellants rely upon ratification by Isaacs as trustee and estoppel against him by his course of conduct. There was no express ratification by Isaacs and no order of the bankruptcy court to that effect. Conceding for the sake of argument that Isaacs might be estopped as an individual dealing with his own property, as an officer of the court he was without capacity to do any act that would prejudice the estate under his administration or to waive the exclusive jurisdiction of the bankruptcy court."

See also for like decisions *Baxter* v. *Emory University,* 107 Fed. (2d) 115 (5 C. C. A.); *Federal Land Bank* v. *Morrison,* 133 Fed. (2d) 613 (6 C. C. A.); *Guaranty Trust Co.* v. *Green,* 139 U. S. 137; *Mutual Res. Fund* v. *Cleveland Woolen Mills,* 82 Fed. (2d) 508 (6 C. C. A.); *Lincoln Nat'l Life Co.* v. *Scales,* 62 F. (2d) 582 (5 C. C. A.); *In re Weldmer,* 82 F. (2d) 566 (7 C. C. A.).

Under the authority of the above cases, Wheat, as the quasi trustee, was without capacity to do any act that would prejudice the exclusive jurisdiction of the Bankruptcy Court.

It is clear that the debtor, once his petition was filed under Section 75, could not take any action concerning the property as an individual that would waive the exclusive jurisdiction of the court.

V.

The re-examination of an order previously made by a bankruptcy court puts the basis of that earlier order again in issue, and if such order is erroneous, it is error not to set it aside.

Upon debtor filing his motion to reopen and reinstate the proceedings, the court set the matter for hearing. Thereafter the appellees filed their answer thereto (R. 16-26), to which debtor filed his reply (R. 28). The unsecured creditors also filed a motion to reopen and reinstate (R. 15). The matter came on for hearing and the court re-examined the basis of its original order of December 14, 1937. (Debtor submitted findings of fact and conclusions of law and the court took the matter under advisement in order to consider the law (R. 100).) The court thereafter filed its findings of fact and conclusions of law (R. 37-44), and its decree (R. 114-115), refusing to modify its order of December 14, 1937, as to petitioners, *but* it granted affirmative relief to the respondents. It vested the title in the respondent O'Daniel (R. 115). The law is settled that the court had the power to reopen the proceedings and revise its order. It is equally settled that the court did reopen the proceedings. *Wayne United Gas Co.* v. *Owens Ill. Glass Company,* 300 U. S. 131, 57 S. Ct. 382; *Pfister* v. *Northern Finance Co.,* 317 U. S. 144, 63 S. Ct. 133, 138.

The court having reopened the proceedings "put the basis of the earlier order again in issue" (Pfister case,

supra). The court erred in not setting aside the "earlier order" even though it was voidable and not void for it did not find that "rights had intervened which would render it inequitable to reconsider the merits." "The respondent (mortgagee) went forward with the proceedings in the State Court looking to a sale of the debtor's property, with full knowledge that a rehearing might be granted and that the order entered thereon might be appealed. They are not entitled, therefore, to rely on any status required in the State Court suit as precluding further consideration of the proceedings." *Wayne Gas Co.* v. *Owens, supra.* "The filing of the petition was a *caveat* and notice to all the world." *Price* v. *Louisiana Center, supra.* The respondent O'Daniel knew all about the proceedings and would not have attempted to purchase the property had not respondent mortgage company guaranteed the title of same to him (R. 86). Neither respondent can qualify as a bona fide purchaser as each had actual and constructive notice of the proceedings. *Houston Oil Co.* v. *Wilhelm,* 182 Fed. 474 (5 C. C. A.); *U. S.* v. *California Land Co.,* 13 S. Ct. 458, 148 U. S. 31. The respondent mortgage company was not in good faith as is evidenced by the record. The good faith of respondent O'Daniel can be challenged.

The court in its order of November 23, 1937 (R. 57-62) stated (R. 61), "the weight of evidence seems to place it (the value of the ranch) at about $10.00 per acre" and continued the cause to the 13th day of December, 1937. There is no provision in the Act for an appraisal of debtor's property under subsection (a-r). The evidence on which the court predicated its finding of value is not shown. Mr. Klett, attorney for respondent mortgage company, when testifying as an adverse witness, could not recall a witness who testified to the value of the debtor's

property (R. 93). The debtor testified (R. 73) that he was in court and never heard anyone testifying to the value of his property. Mr. Garlington testified that his property adjoined that of the debtor's, was of the same character, and that in 1937 he sold some of his from $22.50 to $30.00 per acre (R. 90). The schedules of the debtor's petition in bankruptcy show a value of approximately $30.00 per acre. On December 14, 1937 (R. 62-63), the court found "that there is no equity in said land, or any equitable or feasible method of liquidation or of financial rehabilitation for said (debtor) and no rights under the aforesaid bankruptcy proceeding," and permitted the mortgagee to proceed with its foreclosure and State Court proceeding. The debtor emphatically denies that he has not any "rights under the bankruptcy proceeding" and states that is was the intent and purpose of the Act to protect those rights.

As stated in the Senate Judiciary Committee in reporting the amendments, Report No. 985, 74th Congress:

> "In legislating on this subject it is just as much the duty of Congress to consider the unfortunate debtor as to consider the unfortunate creditor * * * All that the mortgagee or lien-holder ever was, or is, entitled to in this country is the value of the property as is judicially determined. * * *"

This order we maintain is void, but if not void, it certainly was erroneous. *John Hancock Mutual Life Ins. Co.* v. *Bartels, supra, Union Joint Stock Land Bank of Detroit* v. *Byerly, supra.* The court upon the re-examination of this order erred in not reversing it.

The court, having reopened the proceedings on the respective motions of debtor and the unsecured creditors and having re-examined the basis of its original order, and having not found that any rights had intervened

since the dismissal of debtor's proceedings on December 14, 1937, which could not be adequately safeguarded upon the reopening of the debtor's proceedings and the reinvesting in debtor of the title to the property, erred in not setting aside said order of December 14, 1937, so that the debtor and his unsecured creditors could have their day in court.

VI.

The judgment of the State Court did not prohibit the District Court from reinstating the proceeding.

The Bankruptcy Act (11 U. S. C. A. 11 (8)) provides that a Bankruptcy Court may "reopen estates for cause shown." What constitutes "cause" for reopening a closed estate lies primarily within the discretion of the district judge. *In re Butts,* 123 F. (2d) 251 (2 C. C. A.). "The entire process of rehabilitation, reorganization, or liquidation is open for re-examination out of time by the District Court, in its discretion, and subject to intervening rights." *Pfister* v. *Northern Ill. Finance Co., supra.*

The affirmance of a decree by a higher court does not prohibit a court of equity from setting aside its decree during the term it was entered. *Nelson et al.* v. *Meehan et al.,* 155 F. 4 (9 C. C. A.). A "Bankruptcy Court applies the doctrine of equity, but the fact that such a court has no terms, and sits continuously, renders inapplicable the rules with respect to the want of power in a court of equity, to vacate a decree after the term has ended." *Wayne United Gas Co.* v. *Owens Ill. Glass Co., supra.*

The record does not show and the court in its findings did not find that rights had intervened that would render it inequitable to reinstate the proceeding.

The record in this case shows that the order permitting foreclosure, the State Court judgment title in respondent Mortgage Company, and the alleged conveyance of title by it to respondent O'Daniel all transpired while debtor's proceedings were pending under (a-r) (R. 37-40, 8 (12) 17 (13)). The amended petition under (s) was also pending.

As stated in *Naylor* v. *Cantley, supra:*

> "Since, under the provisions of Section 75 of the Bankruptcy Act as amended, the court of bankruptcy was, upon the filing of the petition, vested with the sole and exclusive jurisdiction of the debtor and his property, and since *that court could not surrender its jurisdiction to any other court* (italics ours), it was incumbent upon the court of bankruptcy to administer the estate of the farmer debtor in accordance with Section 75 of the Bankruptcy Act (citing cases)."

This Court, in *Wayne United Gas Co.* v. *Owens, supra,* held:

> "Confirmation of a Commissioner's sale, payment of the purchase price, * * * and execution and delivery of a deed to the purchaser, * * *"

did not affect the Bankruptcy Court's exclusive jurisdiction. For

> "It appears not only that respondent (mortgage company) was party to the proceeding, but that prior to the consummation of sale the State Court was fully advised of the steps taken in the Federal Court * * *.
>
> "The respondents went forward with the proceedings in the State Court, looking to a sale of the debtor's property, with full knowledge that a rehearing might be granted and that the order entered

> thereon might be appealed. They are not entitled, therefore, to rely on any status acquired in the state court suit as precluding further consideration of the petition * * *" for reinstatement of the proceeding.

In Re Keever et ux, 99 Fed. (2d) 696, 697 (7 C. C. A.), the court held:

> "Appellants both had notice of the pendency of the proceedings under Section 75 prior to the issuance of the deed, and had no right to proceed further with the State Court proceeding after the District Court as a court of bankruptcy acquired jurisdiction over the debtors and their property. *Cf. Hoyd* v. *Citizens Bank*, 6 Cir., 89 F. (2d) 105. It follows that the deed was wrongfully issued, and that the District Court had the power to set it aside since it interfered with the valid exercise of its jurisdiction."

See also *Pepper* v. *Litton*, 308 U. S. 295, 60 S. Ct. 238, 243.

As stated in *Wragg* v. *Federal Land Bank of New Orleans*, 317 U. S. 325, 63 S. Ct. 273:

> "In the interpretation and application of the Bankruptcy Act as in the case of other federal statutes, federal not local law applies. *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89, 95, 62 S. Ct. 978, 982, 86 L. Ed. 1293, and cases cited. It is for the bankruptcy court to determine, by reference to the provisions of the bankruptcy statute, what rights created by state law—regardless of the characterization which may be applied to them by state statutes and decisions—are within the jurisdiction of the bankruptcy court. *U. S.* v. *Pelzer*, 312 U. S. 399, 402, 403, 61 S. Ct. 659, 660, 661, 85 L. Ed. 913."

The law is settled that the State Court proceeding did not prohibit the Bankruptcy Court from reinstating this proceeding.

VII.

"The protection of the farmers was left to the farmers themselves or to the Commissioners who might be laymen, and considerations as to whether the issue of jurisdiction was actually contested in the county court, or whether it could have been contested, are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this act." *Kalb v. Feuerstein, supra.*

A farmer is not presumed to know the niceties of procedure that enure to a skilled advocate of law after years of practice. This debtor, relying on this remedial and humanitarian act, filed his petition in court praying for the relief therein provided. Instead of securing relief, the court, by a proceeding unwarranted by the Act, authorized an immediate foreclosure of his property. Debtor then filed an amended petition under (s) with the Conciliation Commissioner as the Act provided. No action was taken on the (s) petition and the farmer is now penalized because of some dereliction of duty on the part of the court's officer. He saw his property being sold and his cattle removed. He asked, unadvisedly perhaps, relief from the State Court. He then returned to the court of equity, which had unjustifiably perpetrated the wrong and which had the power to rectify the wrong, but alas, instead of receiving justice, technicalities were raised to prevent the farmer from reclaiming his own property; technicalities that Congress knew the farmer would not be cognizant of and justly laid aside.

The Appellate Court did not seem to grasp the purpose of Congress in enacting the law. Above all things it in-

tended to save American farm homes and restore them to proper condition. It intended this act to be applied to the case at bar. That the Judiciary Committee of the Senate in reporting the amendment, August 1, 1935, stated:

> "We may state further that many of the district courts and some of the circuit courts of appeal and the Supreme Court have given the proper construction of the language in the present act; but we are sorry to note that others have misconstrued it * * * Nine out of ten of the distressed farmers will be able to get adjustments outside of court, because of the moral effect of the act, and in the rest of the cases, there will be orderly liquidation, with a review of the rehabilitation of the farm debtor as well as the full protection to the creditors. This, public conscience, as well as public interest and welfare, demands. * * *"

It was the duty of the court to construe this act in that light and apply the said act to this case. Instead of that it erroneously turned away from said purpose and permitted the foreclosure and thereby utterly defeated the purpose of this remedial act.

This is a remedial act and must be construed in that light to carry out the intent of Congress in enacting a law to save farm homes. The giving of this right excludes everything which would stand in the way of that right.

Conclusion.

This case involves matters of vital importance in the administration of the Bankruptcy Act. The debtor's proceedings can be reinstated and relief granted to the debtor without injury to the mortgagee or to the purchaser, O'Daniel. The mortgage can be reinstated and the purchaser reimbursed by the mortgagee and thereby equity will be satisfied. The petitioner, Joseph Benton

heat, prays that a writ of certiorari be issued to the
ppellate Court below.

Dated at Kansas City, Missouri, March 21, 1946.

Respectfully submitted,

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FRANK P. BARKER,
Counsel for Petitioner.

OHN W. HUDSON,
Of Counsel.